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1. **Commencement date**

It is unclear to me whether the legislature intends the amendments to apply retrospectively from 1 July 2017.

A statement in the explanatory materials suggests that the amendments will apply retrospectively as it is stated that: ‘*in practice, the amendment largely applies from 1 July 2017*’ (see paragraph 1.15 of the exposure draft EM).

However, the draft bill does not in fact provide for commencement of the amendments until the first day of relevant quarter first occurring after the legislation receives Royal Assent (see item 2 of the table appearing with ‘Commencement information’ at the start of the draft bill).

Accordingly, it is not clear to me why the EM assumes practical commencement retrospectively occurs on 1 July 2017.  Therefore it is submitted that further clarification is required on this timing issue.  There are also practical ramifications for any retrospective application set out below.

1. **Retrospective application**

If the proposed amendments are to apply retrospectively there are various problems that can be envisaged around how death benefits might have already been paid since 30 June 2017.  For example, a trustee may have determined not to automatically pay a reversionary TRIS to a reversionary beneficiary (due to the stated position of the Australian Taxation Office (**ATO**)) and the death benefit may have then had to have been paid and distributed amongst dependants and the legal personal representatives at the discretion of the trustee or in accordance with a binding nomination that applied if there was no reversionary beneficiary in play.

Similarly, there may have been confusion since 1 July 2017 about the ongoing payment of a reversionary TRIS in respect of a primary pensioner who died many years prior to 1 July 2017.  It is possible that any such reversionary pensions were commuted and re-commenced and/or cashed out (with possible adverse ramifications for the recipient) by 1 July 2017.

Accordingly, as is often the difficulty with retrospective legislation treatment, now seeking to apply these amendments from 1 July 2017 (if that is in fact what is intended) has the potential to interfere with the process for payment of death benefits that have actually been paid out since 30 June 2017.

I submit that this particular issue could not be addressed by administrative action by the ATO (or the Australian Prudential Regulation Authority (**APRA**)) because the death benefit may have already been paid on the basis that the reversionary beneficiary was *not* automatically entitled.  This is not simply a matter impacting the taxation treatment of reversionary TRISs, but it extends to a trustee determining whether a dependant has a binding entitlement to a death benefit pension.

I suggest that a preferred approach may be for the amendments to apply prospectively only and that the explanatory materials contain an acknowledgment that differing treatment of reversionary TRISs has been open to funds depending upon the terms governing the pension benefits offered and it is a decision for each fund to determine how their own rules have been applied.

1. **Automatic reversion on death**

The proposed insertion of a new paragraph (aa) after paragraph 307-80(3)(a) in the manner set out in the draft bill has the potential to be administratively problematic for large APRA funds with unitised investments where they may not be in a position to immediately transfer (or back-date) a TRIS from the taxed pool of assets to the untaxed (ECPI) pool of assets on the death of a pensioner with a reversionary TRIS.  Further, even where the death is reported promptly to the trustee there may be administrative difficulties in then promptly transferring the pension to the ECPI pool of investments.

It appears to me that the effect of the amendment is that as soon as the primary pensioner under a reversionary TRIS dies the assets supporting the TRIS are then in retirement phase and eligible for the ECPI pool.  However, it may be a number of weeks or months (or into the next financial year) before the trustee is informed about the death of the primary pensioner and it would only be after that notice that the trustee can act to move the pension into the ECPI pool of assets.

This might be contrasted with the position where a TRIS has already been moved to ‘retirement phase’ as a consequence of a pensioner reaching age 65 years or satisfying one of the other relevant conditions of release with a nil cashing restriction and notifying the trustee.  In these cases, following the death of the primary pensioner the TRIS would continue in the ECPI pool and there would be no change of taxation treatment necessary.  As such, the automatic transfer to retirement phase makes sense where the TRIS has already entered ‘retirement phase’ prior to the death of the primary pensioner and therefore differs to the scenario above, where the TRIS has never been in retirement phase.

Accordingly, I submit that there is scope for the legislation to distinguish between reversionary TRISs where the primary pensioner has entered retirement phase and those where the primary pensioner is yet to enter retirement phase.

1. **Automatic conversion of primary TRIS**

Following from the point immediately above, I submit that there are clearly now strong grounds for the legislation to provide for the ‘TRIS’ nomenclature to cease to apply upon a primary pensioner with a TRIS entering retirement phase pursuant to the current provisions under section 307-80(3).

From a practical and administrative point of view it is usual for most funds to treat a TRIS as having ceased to be treated as a TRIS upon a primary pensioner having satisfied a condition of release with a ‘nil’ cashing restriction.  Following from the terms of the proposed amendment, any requirement on funds to continue to ‘earmark’ these pensions as TRISs no longer has any relevance or practical application.

Further, such an approach would not prevent funds from still choosing to require that TRISs be formally commuted and re-commenced as an account-based pension on reaching one of the relevant conditions of release.

I have previously made the point that if a member commences a TRIS before age 65 years and is permitted by the fund to continue that pension for life it is unlikely that the fund would continue to recognise the pension as a TRIS – instead the TRIS conditions would have fallen away by no later than the pensioner reaching age 65 years and, unless required by the terms of the pension, the pension would continue to be paid beyond age 65 years as an ordinary account-based pension.

I submit that this matter be addressed in the amendments.